80-1337

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES B. McCORSTIN, JR.,
PLAINTIFF-APPELLANT,

VERSUS

U. S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR RAY O. MARSHALL,
SOLICITOR OF LABOR CARIN ANN CLAUSS,
AND ASSISTANT REGIONAL ADMINISTRATOR
FOR WAGE AND HOUR, EMPLOYMENT STANDARDS
ADMINISTRATION STERLING B. WILLIAMS
DEFENDANTS-APPELLEES,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES B. McCORSTIN, JR., PRO SE
1108 50th. Street, West
Birmingham, Alabama 35208
(205) 785-8872

QUESTIONS PRESENTED FOR REVIEW

(i) Will the U. S. Department of Labor and its agents be allowed to "arbitrarily and capriciously" withhold information requested under the Freedom of Information Act (FOIA)?

(ii) Will an agent of the U. S. Department of Labor be allowed to knowingly make a false statement under oath, concealing evidence and obstructing justice in this case with impunity?

(iii) Will information withheld support the statement made in letter of August 12, 1977 from Cohen to McCorstin (Document 19, Record on Appeal 50) in which he states:

> "Consistent with the statute, efforts were made to conciliate the alleged violation, your termination, by negotiating with U. S. Steel for your reemployment. As a result of these meetings with company officials, you were offered reemployment on the third shift. You declined this offer citing your inability to sleep during daytime hours." (Emphasis added)

or will the information supplied to the contrary by numerous other department officials constitute obstruction of justice or misconduct in office that has precluded justice in this action, and is detrimental to the public interest?

(iv) By what logic did the Labor Department fail to justify, itemize or index and unlawfully withhold the following letters from the court:

1. Letter of April 25, 1977 to President Carter from McCorstin (with Attachments: Letter of October 30, 1975 to President Ford from McCorstin, with Attachments I, II, and III).
2. Letter of June 24, 1977 to McCorstin from Herbert J. Cohen, replying for President Carter.

And how could the district court below have "concluded that the plaintiff re-

ceived all the information he was entitled to under the FOIA, and ex mero motu dismissed this action," and how could the court of appeals "affirm the district court's ruling as to plaintiff's FOIA claim," when the courts never requested to see McCorstin's file and even denied him the opportunity to present his files?

(v) Will the decision rendered by the federal court of appeals which has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court, be cause for an exercise of this Court's power of supervision?

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

STATUTE WHICH THE CASE INVOLVES ... 3

CONCISE STATEMENT OF THE CASE 4

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT 14

APPENDIX

1. Final Order of the United States District Court 1a

2. Opinion of the United States Court of Appeals for the Fifth Circuit 2a

3. Judgment 16a

4. Denial of Rehearing 18a

TABLE OF AUTHORITIES

EPA v. Mink, 410 U.S. 73, 89, 93 S.Ct. 827, 837 (1973) 13a

NLRB v. Sears Roebuck, 421 US. 132, 154-155, 159-160, 95 S.Ct. 1504, 1518, 1521 (1975) 13a

Pope v. United States, 599 F.2d 1383, 1385 n.2 (1979) 4a

TABLE OF AUTHORITIES (Continued)

Page

Vaughn v. Rosen, 484 F.2d 820, 821 (D.C. Cir. 1973) cert. denied, 415 U.S. 977, 94 S.Ct. 1564 (1974) 9,12a

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. 5,27,28,29,30,31,35,2a,14a

Federal Rule of Civil Procedure 11 ..... 7,8a

Federal Rule of Civil Procedure 12(f) 9a

Federal Rule of Civil Procedure 38(b) 10a

Federal Rule of Civil Procedure 55 ..... 7a

Federal Rule of Evidence 201 .. 11,7a,8a

The Freedom of Information Act, 5 U.S.C. § 552 ... i,3,4,8,9,13-17, 32-35,1a-5a,7a, 11a-13a,15a

Union Calendar No. 412, 95th Congress, 1st Session..House Report No. 95-793, A CITIZEN'S GUIDE ON HOW TO USE THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT IN REQUESTING GOVERNMENT DOCUMENTS 31-35

TABLE OF AUTHORITIES (Continued)

Page

5 C. Wright & A. Miller, Federal Practice and Procedure § 1334 (1969) 8a

9 C. Wright & A. Miller, Federal Practice and Procedure § 2320 (1971) 11a

21 C. Wright & K. Graham, Federal Practice and Procedure §§ 5104-5106 (1977) 9a

28 U.S.C. § 1254 2

28 U.S.C. § 1331 13

29 CFR 70.25 ..... 6,15,16,13a

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FOR WAGE AND HOUR, EMPLOYMENT STANDARDS
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DEFENDANTS-APPELLEES,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 3, 1980, whereby dismissal of petitioner's lawsuit was AFFIRMED.

OPINIONS BELOW

The United States District Court DISMISSED, ex mero motu the 6th day of February, 1980.

The United States Court of Appeals for the Fifth Circuit AFFIRMED the 3rd day of October, 1980.

The petition for rehearing, timely filed, in the United States Court of Appeals for the Fifth Circuit was DENIED on the 14th day of November, 1980.

JURISDICTION

The date of the judgment sought to be reviewed issued on October 3, 1980.

The petition for rehearing, timely filed, was DENIED on November 14, 1980.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is contained in 28 U.S.C. §1254.

STATUTE WHICH THE CASE INVOLVES

This case involves The Freedom of Information Act 5 U.S.C. §552 and especially §§(b)(4), (5), (7)(A), (7)(C), and (7)(D) which read as follows:

> "b(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;"
> "(b)(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings,...(C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,."

CONCISE STATEMENT OF THE CASE

October 6, 1978 the petitioner, McCorstin, filed a "Request for Information Under the Freedom of Information Act" with the Secretary of Labor. Record on Appeal 39.

By letter of October 17, 1978, Mr. Sterling B. Williams released a single report by Mr. Lloyd Christopher, with deletions and claiming exemptions by Sections (b)(4)(5), 7(A), 7(C), and (7)(D). Record on Appeal 40-43.

By letter of October 18, 1978, McCorstin appealed the decision to Miss Carin Ann Clauss and gave notice that a reply was expected within 20 working days, as required by the Act. If it was decided not to release the requested information, then McCorstin planned to take the matter to court. Record on Appeal 44-45.

Over 8 1/2 months later, by letter of July 6, 1979, Clauss released 153 numbered documents under a heading "CONTENTS OF INVESTIGATIVE FILE CONCERNING U. S. STEEL CORPORATION (James B. McCorstin, complainant)" and stating:

> "I am releasing herewith a copy of our entire record except the following information which I have decided to withhold pursuant to the exemptions indicated."

Only exemptions claimed were 5, 7(C) and 7(D). Record on Appeal 46-55. This was 7 years, lacking 17 days, after the date of Christopher's report and 6 days after all responsibility for policy and decision-making and enforcement of the Age Discrimination in Employment Act of 1967 was transferred to the Equal Employment Opportunity Commission. When the report was first released it read:

> "Recommendation: No effort has been made to determine through investiga-

> tion whether the complainant has been discriminated against because of his age, but only an attempt to effect a settlement of his claim through conciliation." Record on Appeal 43.

At this time the complete Recommendation in Christopher's report was withheld and only exemption 5 and 29 CFR 70.25 was claimed. In Camera Item 140a. Record on Appeal 55.

Clauss's last sentence stated:

> "This letter constitutes final agency action for purposes of judicial review." Record on Appeal 48.

With absolute knowledge of numerous documents unlawfully withheld and conclusive evidence of arbitrary and capricious withholding of information, on September 29, 1979, McCorstin filed a COMPLAINT In The United States District Court for the Northern District of Alabama, Southern Division, seeking the production of the entire files possessed on him by the U. S. Department of Labor.

Record on Appeal 1.

The government answered on October 30, 1979 but failed to comply with Federal Rule of Civil Procedure 11 in that they did not state their address in the Answer. McCorstin filed a motion for judgment by default which was overruled by the trial court. The Court of Appeals affirmed on the basis that the plaintiff asserted no prejudice resulting therefrom.

The government filed a motion to dismiss the named defendants. The trial court overruled.

Affidavit of Sofia P. Petters was filed November 20, 1979. Petters swears, in paragraph 9 and 10, as follows:

> "9. On October 18, 1978, Mr. McCorstin sent an appeal to the Solicitor of Labor (see Attachment #7). It became evident that Mr. McCorstin was requesting not just materials with respect to his 1972 complaint, but all documents in his file beginning with his 1972 complaint.

"10. On July 6, 1979, the Solicitor of Labor acted on Mr. McCorstin's appeal by sending to him copies of the entire contents of his file except for specified information deleted as permitted by 5 U.S.C. 552 (b)(5), (7)(C) and 7(D)(see Attachment #8)." Record on Appeal 15.

Affidavit of James B. McCorstin, Jr. was filed on December 10, 1979 and among other things swears:

"3. ...I received an incomplete file from Solicitor of Labor Carin Ann Clauss. The cover letter was dated July 6, 1979, over eight months after my Freedom of Information Act Appeal. The withholding of information has had a very detrimental effect on my litigation against United States Steel Corporation.

"4. Sofia P. Petters is guilty of perjury in her affidavit before this Court. She has included in her affidavit documents which were withheld from the July 6, 1979 file transmittal as purported in Paragraph 10 of her affidavit." Record on Appeal 56-57.

On December 20, 1979, the trial court issued an Order that the period for the completion of discovery relating to The Merits shall end April 20, 1980.

On December 21, 1979, McCorstin filed a "Motion Under Vaughn v Rosen to Require Detailed Justification, Itemization and Indexing." It requested:

> "...a detailed justification for allegations contained in defendant's answer, and in earlier administrative denials, that the requested documents are exempt from disclosure under The Freedom of Information Act, 5 U.S.C. §552, as amended, including an itemized index of the documents which are claimed to be exempt, correlating specific statement in such justification, with actual portions of all of the requested documents..." Record on Appeal 65.

By affidavit of McCorstin filed January 7, 1980, allegation of making a false statement to a government agent was reported to the U. S. Attorney's Office; allegations of perjury by Sofia P. Petters, and arbitrarily and capriciously withholding information in obstruction of justice by Ray O. Marshall, Carin Ann Clauss and Sterling B. Williams were brought to the attention of the district

court. Record on Appeal 66-67.

Affidavit of Ruth Christian filed January 7, 1980 swears:

> "I have never indicated to the United States Department of Labor that I wanted or desired any communication on my behalf to be considered private or confidential." Record on Appeal 68.

Then by letter of January 18, 1980, Caryl P. Privett informs Judge Guin as follows:

> "Dear Judge Guin;
> In going through the files of documents which we have submitted for in camera inspection in this case, I noted that there are a number of documents dated 1978 not supplied to Mr. McCorstin. After inquiring with the agency, I am advised that these documents all relate to a charge filed by Mr. McCorstin in April 1978 and are, therefore, not covered by his FOIA request which was limited to his 1972 charges. An examination of these documents, which are unnumbered, will bear this out. These additional documents are supplied to the Court only to show the Court the agency's complete filed relative to Mr. McCorstin. No determination as to whether these documents should or should not be released under FOIA has been made by the agency as the documents have not been the subject of such a request." Ex-

hibit C, Record on Appeal 75-86.

It was after Privett's letter that McCorstin filed on January 21, 1980 his "Request for Judicial Notice," specifically identifying arbitrary and capricious withholding of information and the criminal acts of perjury and obstruction of justice. Record on Appeal 75-86.

Judge Guin then in rapid order issued ORDERS as follows:

January 24, 1980.
"Request for Judicial Notice under Rule 201(d), Federal Rules of Evidence," be an it is hereby STRICKEN from the record. Record on Appeal 87.

January 28, 1980.
Motion for detailed justification, itemization, and indexing DENIED. Record on Appeal 88.

February 4, 1980.
Request for Explanation filed February 1, 1980 STRICKEN as impertinent, sua sponte. Record on Appeal 89.

February 4, 1980.
Jury demand filed February 1, 1980 STRICKEN as impertinent, sua sponte.

Record on Appeal 90.

February 6, 1980.
"FINAL ORDER" DISMISSED the case, ex mero motu. Record on Appeal 91.

The above abuse of discretion by the district court, especially in light of the fact that the plaintiff was denied discovery by issuing a FINAL ORDER 2 1/2 months prior to the discovery cut-off date of April 20, 1980 and denying the plaintiff the opportunity to present evidence to disprove the fraudulently constructed files submitted by the defendands. The two files submitted by the defendants were the sole basis for DISMISSING this suit. The district court erroneously stated that:

> "...having made an in camera comparison of materials released to plaintiff and those materials not released, this court is of the opinion that this cause is to be dismissed, ..." Record on Appeal 91.

The district court has not seen or had in its possession the materials released

to the plaintiff. The court has seen only the materials submitted by the defendants and purported by the defendants to be those materials released to the plaintiff, and those materials not released.

The plaintiff has not been allowed to present to the courts materials known by the plaintiff to have been in the possession of the defendants.

Jurisdiction is conferred on the district court, of first instance, by virtue of 5 U.S.C. Section 552(a)(4) and in the ANSWER defendant states:

> "1. It is admitted that this Court has jurisdiction to hear this action under 28 U.S.C. §1331." Record on Appeal 1-3.

McCorstin timely filed an Appeal to the United States Court of Appeals for the Fifth Circuit on February 11, 1980.

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

QUESTIONS (i) AND (ii):

There can be no doubt that by letter of October 17, 1978 Sterling B. Williams sent McCorstin a 2-page report submitted by Lloyd Christopher. Williams made two deletions on this report and stated:

> "Such records are exempt from disclosure under the Freedom of Information Act by Sections 552(b)(4)(5), 7(A), 7(C), and 7(D)." Record on Appeal 40.

By affidavit, Sofia P. Petters swears in paragraph 8:

> "...Deletions in the document were made pursuant to 5 U.S.C. 552(b)(4),(5), (7)(A), 7(C) and 7(D)..." Record on Appeal 15.,

and then in paragraph 10:

> "10. On July 6, 1979, the Solicitor of Labor acted on Mr. McCorstin's appeal by sending to him copies of the entire contents of his file except for specified information deleted as permitted by 5 U.S.C. 552(b)(5), (7)(C) and 7(D) (see Attachment #8." Record on Appeal 15.,

and then in Attachment #8 the report is identified as "140. Conciliation Report dated 8/3/72." Record on Appeal 55., and then Petters swears:

> "12. Following is a list of deletions from the documents, accompanied by a citation of the exemption under 5 U.S.C. 552(b) used for each deletion. Record on Appeal 16.
>
> "...RR. Document 140, second page (104a); deletions based on exemption 5 and 29 CFR 70.25." Record on Appeal 21.

The citing of (104a) in the above paragraph obviously is a simple typographical error and should, of course, be (140a). But claiming of exemptions under 5 U.S.C. (b)(4), (5), 7(A), 7(C) and 7(D) in the initial report submitted by Willaims, and subsequently the false statement, under oath by Petters in her affidavit in paragraph 8 and subsequently releasing the report claiming only "deletions based on

exemption 5 and 29 CFR 70.25, (Record on Appeal 21) is arbitrary and capricious and constitutes perjury by Petters.

Further compounding the criminal intent to withhold information, consider the "Recommendation" in Christopher's report as released by Williams which states:

> "Recommendation: No effort has been made to determine through investigation whether the complainant has been discriminated against because of his age, but only an attempt to effect a settlement of his claim through conciliation." Record on Appeal 43.,

and then in Petters' affidavit Attachments #8, 9 and 10, (Record on Appeal 46-55) a heading of the list of documents released by Carin Ann Clauss reads:

> "CONTENTS OF INVESTIGATIVE FILE CONCERNING U. S. STEEL CORPORATION (James B. McCorstin, complainant)" Record on Appeal 50.,

and then in file record RR., Document 140a the entire verbage of the Recommendation is obliterated in an effort to cover-up

the fact that no investigation was ever conducted.

This action, as has been brought to the attention of the district court as well as to the court of appeals, is so patently unjust and the federal court of appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Honorable Court's power of supervision.

McCorstin has exhausted all avenues available to try to bring to the attention of the Court and the proper authorities the arbitrary and capricious withholding of information under The Freedom of Information Act and the criminal acts that have precluded justice in this case. There are so many additional documents that have been withheld, space is not

available to itemize and verify them.

The courts have not allowed McCorstin to present the voluminous documents known by him to be in the possession of the U. S. Department of Labor files and unlawfully withheld. Neither the district court nor the court of appeals has seen or had in their possession the documents released to McCorstin, and could not possibly have compared the materials released to McCorstin with those purportedly not released.

QUESTION (iii)

The following documents from the file released to McCorstin by letter of July 6, 1979 (Attachment #8 of Sofia P. Petters' affidavit, Record on Appeal 46-55) reveal data that show clearly that U. S. Steel refused to take any favorable action with respect to McCorstin's claims of violations of the ADEA by U. S.

Steel against himself and others similarly situated:

1. Document 136, dated 8/1/72
"The firm refused to take any favorable action with respect to the complainants claim of age discrimination."

2. Document 137, dated August 2, 1972
"The firm has refused to take any favorable action with respect to your claim."

3. Document 134, dated 8/3/72
"They were not successful and the complainant has been advised."

4. Document 140, dated 8/3/72
"The Company would not offer to take any favorable action with respect to McCorstin's claim."

5. Document 126, dated March 16, 1973
"The conference failed to achieve any affirmative results.
"We have carefully reviewed the file and have determined that further attempts to conciliate this matter would be futile."

6. Document 116, draft letter undated
"At the conclusion of this conference, Mr. Ruel Russell, Superintendent of Personnel Services, advised Mr. Christopher that there was no basis for the complaint and the firm was refusing to take any favorable action in regard to Mr. McCorstin's claim."

7. Document 85, 85a, dated June 14,1973
"At the conclusion of this conference, Mr. Ruel Russell, Superintendent of Personnel Services for the employer, advised Mr. Christopher that there was no basis for the complaint and the firm was refusing to take any favorable action in regard to Mr. McCorstin's claim."

8. Document 115, 115a, dated June 15, 1973
(Same statement as in #7 above.)

9. Document 83, dated Sep 24, 1975
"Unfortunately, these efforts proved to be unsuccessful and Birmingham Area Director Hunter so advised you in his letter of August 2, 1972."

10. Document 42, dated 1/7/77
"At this meeting Attorney Ingram stated that they felt this notice was a part of the continued harrassment of U. S. Steel by Mr. Joseph McCorstin and stated that the firm did not feel they had discriminated against these employees under the ADEA."

11. Document 25, dated January 7, 1977
"Assistant Area Director Lyndel L. Erwin reported that the firm's representative maintains age was not a factor in the retirement of these individuals and refuse to take any favorable action with respect to their complaint."

12. Document 35, dated 2/28/77
"1-28-77 Review Cl unsuccessful concil."

and then by letter of August 12, 1977 (Document 19), Mr. Herbert J. Cohen, Assistant Administrator, (responding to further inquiry as pertains to McCorstin's letter of April 25, 1977 to President Carter and Cohen's letter of June 29, 1977 in reply for the President) stated:

> "On June 28, 1972, you filed a notice of intent to sue under the provisions of the Age Discrimination in Employment Act. Consistent with the statute, efforts were made to conciliate the alleged violation, your termination, by negotiating with U. S. Steel for your reemployment. As a result of these meetings with company officials, you were offered reemployment on the third shift. You declined this offer citing your inability to sleep during daytime hours."

McCorstin has been unemployed for over 9 years and in litigation for over 7 years seeking reemployment and has never been offered reemployment as a result of any action by the Department of Labor.

Will this Honorable Court allow the U. S. Department of Labor to withhold information that would show that McCorstin was offered reemployment and this offer was never tendered to him? Have the authors of documents in paragraphs 1 through 12 falsely stated the facts or has Mr. Herbert J. Cohen?

Subsequently, by letter of September 2, 1977 (Document 11), Mr. Sterling B. Williams responds to Senator John Sparkman's inquiry on behalf of Ruth Christian as follows:

> "As required by the statute, our staff made an attempt to conciliate the dispute at a meeting held with company officials on December 7, 1976. The company asserted that it had not discriminated against the employees in any way and that this notice was a part of the continued harassment by a group of individuals who had accepted early retirement. After considering the matter, the company refused to take any favorable action regarding any of these 21 individuals, including Ruth Christian. (underscored name supplied by McCorstin)

QUESTION (iv):

It is illogical to determine that letters sent or received by the plaintiff should be withheld under the FOIA. It, therefore, follows that either the United States Department of Labor withheld them from the courts below or there is a cover-up by the courts below to suppress information contained therein.

The letter sent by McCorstin to President Carter (with Attachments) follows:

"1108 50th. Street, West
Birmingham, Alabama 35208
April 25, 1977

"Honorable Jimmy Carter
President
The White House
Washington, D.C. 20500
Ref: CA74-H-100-S
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHERN DIVISION

"Dear Mr. President:

"Your highly moral personal commitment concerning human rights, even as pertains to rights in other countries, is most encouraging. However, there exists, and has existed during the past two administrations, a complete disre-

gard of the human rights of a group of former employees of United States Steel Corporation, which has been denied its rights by the Department of Labor, the Justice Department, and the two past Presidents. I am referring to the mass violations of the Age Discrimination in Employment Act of 1967 by United States Steel Corporation against a class of exempt and non-exempt excluded employees in the 40-65 age group that has been reported to the U. S. Department of Labor on several occasions during the last two administrations. The Labor Department has, at the least, shown a dereliction of duty in pursuing the complaints, and most likely a criminal conspiracy involving stonewall, deep-six, and cover-up of the charges and actions by those administrations.

"The enclosed correspondence should be sufficient to warrant the establishment of a watch-dog commission by the Attorney General to investigate and bring charges against those involved.

"Will you please also show your concern for the human rights of this class of United States citizens by having the Attorney General and the Secretary of Labor investigate and pursue the legal aspects as pertains to these people who have been willfully discriminated against in violation of their human rights.

"Please, Mr. President, this is a matter that cannot be routinely handled by department personnel below the cabinet level as personnel from previous administrations are

still employed in the departments involved. Respectfully, Sir, this also could possibly include the head of the Federal Bureau of Investigation.

Respectfully,
/s/James B. McCorstin, Jr."

"Attachments"

Attachment to above letter,

"1108 50th. Street, West
Birmingham, Alabama 35208
October 30, 1975

"Honorable Gerald R. Ford
The White House
Washington, D.C.
Ref: CA74-H-100-S
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHERN DIVISION

"Dear Mr. President:

"I seek justice for all "exempt and non-exempt excluded employees in the 40 to 65-age group" who have been discriminated against by United States Steel Corporation in violation of the Age Discrimination in Employment Act of 1967.

"By letter of July 15, 1975 I appealed to you on behalf of this class of employees (Attachment I).

"By letter of September 24, 1975 Mr. Francis W. McGowan wrote that my letter was referred to his office for reply (Attachment II). To me, this indicated that he was charged with the responsibility of answering for the Presidency.

"It is unnecessary to refer you to the first sentence of my letter of July

15, 1975. It is immensely important that you know that my letter of August 28, 1972 to the Secretary of Labor was received, acknowledged and forwarded to the Solicitor of Labor (Attachment III).

"Mr. McGowan's reply is but additional evidence of the continuing attempt by the U. S. Department of Labor to "cover-up" the injustices perpetrated against this class of employees. Mr. McGowan does not even mention these employees.

"Therefore, Mr. President, having made you aware of only some of the injustices against this class of U. S. Steel employees, and desiring that you be fully informed on this matter, I do hereby respectfully request that you direct the Attorney General, through a "watchdog" commission, to investigate this matter and take whatever steps are necessary to correct this travesty of justice.

Respectfully,
/s/ James B. McCorstin, Jr."

"Attachments"

Attachment I,

"1108 50th. Street, West
Birmingham, Alabama 35208
July 15, 1975

"Honorable Gerald R. Ford
The White House
Washington, D. C.

Ref: CA 74-H-100-S
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

"Dear Mr. President:

"It is probable that you inherited, without your knowledge to date, a case of "stonewall," "deep-six" and "cover-up" involving the United Stites Department of Labor and United States Steel Corporation against a class of exempt and non-exempt excluded employees in the 40 to 65 age group. These acts are contrary to the intent of Congress pertaining to the Age Discrimination in Employment Act of 1967. As a matter of fact, Congress has increased the annual appropriation for the administration and enforcement of the provisions of the Act from $3,000,000 to $5,000,000.

"Now, add perjury by Mr. Ruel Russell, Jr., Executive Assistant to the Vice President, Southern Steel Division, United States Steel Corporation, which has been reported to the Federal Bureau of Investigation.

"Will you, Sir, as the President of the United States of America, allow these injustices to continue?

Respectfully,
/s/ James B. McCorstin, Jr."

Attachment II,

"U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

"SEP 24 1975

"Mr. James B. McCorstin, Jr.
1108 50th. Street, West
Birmingham, Alabama 35208

"Dear Mr. McCorstin:

"Your letter of July 15,1975, addressed to President Ford, concerning the De-

partment of Labor's handling of your age discrimination complaint against the U.S. Steel Corporation, has been referred to this office for reply.

"We are advised by our Atlanta, Georgia Regional Office that on June 28, 1972, you filed with our Birmingham, Alabama Area Office a notice of intent to sue the U. S. Steel Corporation. You sought relief from alleged discriminatory practices under the Age Discrimination in Employment Act in connection with your involuntary termination. Upon receiving your notice of intent to sue, in accordance with section 7(d) of the Act, the Birmingham Wage-Hour representatives promptly attempted to eliminate the alleged unlawful practice by means of conciliation, conference, and persuasion. Unfortunately, these efforts proved to be unsuccessful and Birmingham Area Director Hunter so advised you in his letter of August 2, 1972. In this same letter he informed you that your request that the Secretary of Labor institute suit on your behalf was being referred to the Office of the Solicitor of Labor. In his letter of March 16, 1973, Associate Regional Solicitor Norman H. Winston advised you that after a careful review of the file, it had been determined that it would not be appropriate for the Secretary of Labor to file suit on your behalf.

"We are satisfied that the above compliance action was carried out in accordance with established policies utilizing proper procedures. We regret that we cannot be of further as-

sistance to you at this time.
"Sincerely,
/s/ Francis W. McGowan, Director
Division of Equal Pay and
Employment Standards"

Attachment III,

"August 28, 1972
"To: Secretary of Labor
United States Department of Labor
Wage and Hour and Public
Contracts Div.
Birmingham, Alabama 35233
FROM: James B. McCorstin, Jr.
SUBJECT: Violation of Age Discrimination in Employment Act of 1967

"Dear Sir:
"I charge that my employer --- United States Steel Corporation, 600 Grant Street, Pittsburgh, Pennsylvania, 15230 --- has been and continues to be in willful violation of the subject Act in that they are using the "Mutually Satisfactory Retirement" provisions of the Corporation as a subterfuge to discriminate against exempt and non-exempt excluded employees in the 40 to 65 age group in that they are coercing them into signing the so-called "Mutually Satisfactory Retirement" against their will with the alternative of being laid off without pay.
"These actions by my employer are so gross that I request the Secretary of Labor to poll all U. S. Steel exempt and non-exempt excluded employees having retired under "Mutually Satisfactory Retirement" conditions, the past three years to date, to ascer-

tain the extent of willful violations and to bring action against the Company wherever violations are confirmed, to make the employees whole as to amounts owing, and award liquidated damages.

"Sincerely,
/s/ James B. McCorstin, Jr.
1108 50th. Street, West
Birmingham, Alabama 35208"

The letter received by McCorstin from Herbert J. Cohen is as follows:

"U. S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

"Jun 24 1977
"Mr. James B. McCorstin, Jr.
1108 50th. Street, West
Birmingham, Alabama 35208
"Dear Mr. McCorstin:
"This is in reply to your letter of April 25, 1977, addressed to President Jimmy Carter, with further reference to your complaint alleging age discrimination in connection with your termination by the United States Steel Corporation in Fairfield, Alabama.
"I have again reviewed our efforts on your behalf in this matter and can only conclude that the investigation and the conciliation were carried out in accordance with established policies and procedures and within the intent and purposes of the Age Discrimination in Employment Act. I am satisfied that your questions were answered

many times in correspondence with you and in personal interviews and I regret that there is no further action that the Wage and Hour Division can take in this matter.

"The Age Discrimination in Employment Act authorizes the United States Department of Labor to investigate alleged discriminatory practices and to effect voluntary compliance with the law through informal methods of conciliation, conference and persuasion but does not grant us the authority to order or require compliance. Only the Courts can do that.

"Sincerely,
/s/ Herbert J. Cohen
Assistant
Administrator"

The above letters are only a few of the documents known to have been received, acted upon and replies transmitted to McCorstin by the Department of Labor, which could not conceivably have been withheld under exemptions authorized by the FOIA.

QUESTION (v)

In the Union Calendar No. 412, 95th Congress, 1st Session .... House Report

No. 95-793, A CITIZEN'S GUIDE ON HOW TO USE THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT IN REQUESTING GOVERNMENT DOCUMENTS lists and clarifies exemptions in the FOIA. The text of the pertinent exemptions are as follows:

> "Exemption (b)(4): Confidential business information
> Exemption (b)(4) protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged and confidential."

Clearly, the above exemption does not apply in this action and clarification is not required.

> "Exemption (b)(5): Internal communications
> Exemption (b)(5) applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."
>
> "This exemption was enacted to safeguard the deliberative policy-making processes of government. Congress was concerned that staff assistants and agency personnel might be reluctant to engage in a free exchange of ideas if they knew that all their communica-

tions were subject to public disclosure. However, the Supreme Court has drawn a distinction between agency communications prior to the rendering of a decision and communications concerning a decision once it has been made. Memorandums and letters which reflect predecisional attitudes regarding policy alternatives are not required to be disclosed. But communications that relate to decisions already made must be released. In the Court's view, once a policy is adopted the public has a right to know the basis for that decision.

"The Court has also distinguished between purely factual information and information relating to the policy-making process. Factual information must always be disclosed unless it is (1) inextricably intertwined with information concerning a decisionmaking process or is (2) part of a summary of material of an otherwise public record to be used in the agency's deliberative process."

Clarification of the above exemption is especially illuminating in the sentence which reads:

"In the Court's view, once a policy is adopted, the public has a right to know the basis for that decision."

"Exemption (b)(7): Investigatory files Exemption (b)(7) exempts from disclosure "investigatory records compiled for law enforcement purposes, but only

to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwaranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

"The original provision concerning investigatory files was interpreted by the courts to include almost any file which could be labeled "investigatory" in nature. However, the 1974 amendments to the act narrowed the exemption by providing that investigatory records could be withheld only if their release would result in one or more of six specific harms (listed above). The amendments also changed the language of the provision to cover investigatory "records" rather than investigatory "files." The fact that a particular record is an investigatory file does not mean that it is automatically exempt. Each document or part of each document in the file must now be examined to determine whether its disclosure would result in one or more of the six enumerated harms. Moreover, these portions that

do not fall within any of these categories must be released."

And all decision and policy making authority as pertains to the ADEA was transferred to the EEOC on July 1, 1979 and the decision to withhold or release the information requested was made July 6, 1979, many years after some final decisions were made and six days after all authority under the ADEA had expired.

It has been explicitly shown that the U. S. Department of Labor has arbitrarily and capriciously claimed exemptions and withheld information unlawfully and the courts below have so far departed from the usual course of judicial proceeding as to be cause for the exercise of this Honorable Court's power of supervision.

Therefore, petitioner respectfully requests that review and reversal be

granted.

Respectfully submitted,

James B. McCorstin, Jr., Pro Se
1108 50th. Street, West
Birmingham, Alabama 35208
(205) 785-8872

APPENDIX

1.

J. FOY GUIN, JR., DISTRICT JUDGE:

FINAL ORDER

Having reviewed the record of this case, the pleadings, the submissions of the parties, and the applicable law, and having made an in camera comparison of materials released to plaintiff and those materials not released, the court is of the opinion that this cause is to be dismissed, the plaintiff having received all relief to which he is entitled under the applicable law, the Freedom of Information Act, 5 U.S.C. §552. Accordingly, it is

ORDERED, ADJUDGED and DECREED that this cause be and the same hereby is DISMISSED, ex mero motu.

DONE and ORDERED this 6th day of February 1980.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-7112
Summary Calendar

JAMES B. McCORSTIN, JR.,
Plaintiff-Appellant,

versus

U. S. DEPARTMENT OF LABOR,
ET AL.
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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(OCTOBER 3, 1980)

Before RONEY, KRAVITCH and TATE,
Circuit Judges:

PER CURIAM:

This is an action under the Freedom of Information Act (FOIA)[1] against the United States Department of Labor and officials thereof.[2] The plaintiff, who appears pro se, previously filed actions against United States Steel alleging violations of the Age Discrimination in Employment Act (29 U.S.C. §§ 621 et seq.).[3]

1/ 5 U.S.C. § 552 (1976).

2/ Until July 1979, when a Presidential Reorganization Plan transferred enforcement of the Age Discrimination in Employment Act to the Equal Employment Opportunity Commission, the Employment Standards Administration of the United States Department of Labor was charged with enforcing the ADEA.

3/ On June 10, 1980 this court affirmed one of the judgments in favor of United States Steel Corporation, McCorstin v.

United States Steel Corp., No. 79-3593 (5th Cir. June 10, 1980) on the basis of the district court opinion. In the plaintiff's other ADEA appeal, this court reversed the directed verdict entered in favor of the defendant (on the basis that a prima facie case of age discrimination had not been demonstrated) and remanded for a jury trial on the merits. McCorstin v. United States Steel Corp., No. 78-1951 (5th Cir., filed July 16, 1980).

In October 1978, the plaintiff filed this FOIA request with the Department of Labor for "copies of all documents in your files that were developed as a result of the Notices [of intention to sue] dated June 28, 1972 and August 29, 1972, submitted by me to your office." The Department of Labor produced the relevant documents with some excisions based on asserted FOIA exemptions. The district court after an in camera inspection concluded that the plaintiff received all the information he was entitled to under the FOIA, and ex mero motu dismissed

this action. After our own in camera inspection of documents [e.g., Pope v. United States, 599 F.2d 1383, 1385 n.2 (1979)], we affirm the district court's ruling as to plaintiff's FOIA claim.4/

4/ In order to insure meaningful review of the plaintiff's Freedom of Information Act request, this court formally requested the trial court to supplement the appellate record by having the appropriate party file under seal all the documents (both the completed file and the file with deletions) previously submitted to the district court pursuant to the in camera inspection. We have conducted our own in camera inspection after the documents were filed in this court.

The plaintiff appeals not only the district court's substantive ruling as to his FOIA claim, but also several of the district court's preliminary rulings: denial of plaintiff's motion for default judgment, denial of his request for judidial notice (and request for explanation of same), denial of his motion for itemi-

zation, and denial of his jury demand. We conclude for reasons stated below that the district court did not commit reversible error as to any of these non-dispositive motions.

Context Facts

On July 6, 1979, the Solicitor of Labor pursuant to the plaintiff's administrative appeal sent the plaintiff the entire contents of his file except for specific deleted information that was alleged to be exempt under 5 U.S.C. §§552(b)(5), 7(C) and 7(D). These exemptions generally pertain to staff opinions and recommendations, names and addresses of employees and of those who supplied information to the Department of Labor. The plaintiff filed this FOIA suit in September 1979, alleging that he was entitled to the deleted material.

After the government answered, the

plaintiff filed a motion for default judgment that was overruled. The government filed an affidavit by Sofia Petters of the Department of Labor that detailed the history of McCorstin's case and listed the documents, their deletions, and the specific exemptions claimed for each one. Record on Appeal 11-22.

McCorstin thereafter filed a "motion to require detailed justification, itemization and hearing." After oral argument on January 11, 1980, the district court denied the motion.5/

5/ At oral argument on "the motion to require detailed justification, itemization and hearing" the Department of Labor submitted two files to the court for in camera inspection -- a complete file and one with deletions.

Between the district court's January 11, 1980 motion docket and its final order of

February 6, 1980, the plaintiff filed a request for judicial notice under Federal Rule of Evidence 201(d) that was ordered stricken, a "request for explanation" as to why the judicial notice request was ordered stricken that was itself also ordered stricken as impertinent, and a jury demand that the trial court similarly struck as impertinent. In February, 1980, the district court ordered this cause dismissed since in its view the plaintiff had received all the material he was entitled to under the FOIA.

Default Judgment

The plaintiff initially complains because the trial court denied his motion for default judgment. Default judgment is available under Federal Rule of Civil Procedure 55 when a party has failed to plead or otherwise defend. The government answered on October 30, 1979. The

default motion was filed on November 16, 1979. Therefore, under the controlling rule, default judgment was clearly inappropriate.6/

6/ In a related vein, the plaintiff notes that the attorneys for the defendants did not comply with Federal Rule of Civil Procedure 11 in that their pleadings do not indicate their address. The plaintiff, however, asserts no prejudice resulting therefrom. "[I]n view of the basic policy of the federal rules to adjudicate actions on their merits rather than on procedural niceties, a motion to dismiss or to strike under this rule should not be granted unless the moving party has been severly prejudiced or misled." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1334 (1969)

Judicial Notice

In his request for judicial notice under Federal Rule of Evidence 201, the plaintiff asked the court to take notice that Sofia Petters committed perjury in her affidavit for the Department of Labor. The rule permits the court to take judicial notice of facts "generally known

within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." An allegation of perjury clearly is not contemplated by the judicial notice rule. See generally 21 C. Wright & K. Graham, Federal Practice and Procedure §§ 5104-5106 (1977).

After the plaintiff's request for judicial notice was stricken, he filed a request for explanation of same that was itself later stricken as impertinent. Under Federal Rule of Civil Procedure 12(f) the district court may sua sponte "order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." See generally 5 C. Wright & A. Miller, Federal Practice and Procedure §1382 (1969). Although no court can expect the same meas-

ure of competency from pro se litigants as from lawyers trained and skilled in the law, we conclude that it was not an abuse of discretion for the trial court to order these above described pleadings stricken.

"Motion for itemization"

The plaintiffs motion for itemization filed on December 21, 1979 was properly denied. A month earlier, Petters had filed her affidavit containing the requested detailed itemization of documents and justification for deletions.7/

7/ We note that the trial court in making its decision did not rely on the Petters' affidavit but rather conducted its own in camera inspection of the administrative files at issue.

Jury Demand

Federal Rule of Civil Procedure 38(b) requires that a demand for a jury trial of any issue be served within ten days

after service of the "last pleading directed to such issue." If the only relevant pleadings in the case (as here) are the complaint and the answer, the demand for a jury trial must be served not later than ten days after service of the answer. See generally 9 C. Wright & A. Miller, Federal Practice and Procedure § 2320 (1971). Even assuming that there is a constitutional right to trial by jury in an action under the Freedom of Information Act, the jury demand in this case filed on February 1, 1980 was not timely under the applicable rule, since the defendants had filed their answer on October 30, 1979.

FOIA Request

The Freedom of Information Act provides access to the citizenry of most forms of government records. Essentially, the Act provides that all documents are available

to the public unless specifically exempted by the Act itself. Vaughn v. Rosen, 484 F.2d 820, 821 (D.C. Cir. 1973) cert. denied, 415 U.S. 977, 94 S.Ct. 1564 (1974).

After our review of the administrative files, we conclude that the plaintiff received all the information to which he was entitled and that the claimed exemptions under 5 U.S.C. § 552(b)(5) and (7) were proper. Those exemptions provide that the FOIA does not apply to matters that are:

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . .
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a conficential source and, in the case of a record compiled by a criminal law enforce-

> ment authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source . . .

Exemption 5 generally protects from disclosure the attorney work product, staff opinions and recommendations that precede a final agency decision and that are part of the agency's deliberative process. See NLRB v. Sears Roebuck, 421 U.S. 132, 154-155, 159-160,95 S.Ct. 1504, 1518, 1521 (1975); EPA v. Mink, 410 U.S. 73, 89, 93 S.Ct. 827, 837 (1973). See also 29 C.F.R. 70.25.

Exemption 7 is designed to protect personal privacy and confidential sources. Exemption 7(C) is intended to protect the privacy of any person mentioned in the requested files, not only the person who is the object of the investigation. Exemption 7(D) protects confidential

sources.

Extended discussion of each of the documents in question is infeasible here, since written analysis of each document would invariably reveal some of the exempted information. Suffice it to say that the documents in question were compiled by the department while investigating an ADEA complaint and our examination of each document indicates that the claimed exemptions were properly invoked and correctly judicially recognized.

Summary

In summary, we AFFIRM the trial court's denial of plaintiff's motion for default judgment, denial of his request for judicial notice (and request for explanation of same), denial of his motion for itemization, and denial of his jury demand. Additionally, after having reviewed the relevant documents in camera,

we AFFIRM the dismissal of plaintiff's FOIA suit.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 80-7112
Summary Calendar

D.C. Docket No. CA 79-G-1050-S

JAMES B. McCORSTIN, JR.,
Plaintiff-Appellant,
versus
U. S. DEPARTMENT OF LABOR,
ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

Before RONEY, KRAVITCH and TATE,
Circuit Judges:

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the court upon the record and briefs on file, pursuant to Rule 18.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

October 3, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-7112

JAMES B. McCORSTIN, JR.,
Plaintiff-Appellant,

versus

U. S. DEPARTMENT OF LABOR,
ET AL.,
Defendants-Appellees.

- - - - -

Appeal from the United States District Court for the Northern District of Alabama

- - - - -

ON PETITION FOR REHEARING
(NOVEMBER 14, 1980)

Before RONEY, KRAVITCH and TATE,
Circuit Judges:

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.